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IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Parallel Business Conduct Is Extremely Common, Almost Always Results From Competition Rather Than Collusion, And Thus Is Not A Sufficient Basis For Finding A Conspiracy In Restraint Of Trade. 5

II. The Second Circuit's Decision Creates Perverse Litigation Incentives and Economic Outcomes. 6

A. Discovery In Civil Antitrust Cases Is Extremely Expensive And Discovery Costs Fall Primarily On Defendants. 7

B. The Second Circuit's Standard Encourages Meritless Litigation and Imposes Unjustified Costs On Consumers. 10

III. Private Antitrust Suits Are An Inefficient Means For Discovering Horizontal Antitrust Conspiracies. 11

A. Private Antitrust Suits Alleging Horizontal Antitrust Conspiracies Usually Follow Investigations By The Federal Government 12

B. Allowing Suits Based On Observed Parallel Conduct Would Discourage Rational Economic Decisionmaking 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page(s)

Asahi Glass Co. v. *Pentech Pharms., Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003) 8
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 11
Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 5, 6
In re: Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995) 9
Maio v. *Aetna Inc.*, 221 F.3d 472 (3d Cir. 2000) 4
Lupia v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978) 7
McCleneghan v. *Union Stock Yards Co.*, 298 F.2d 659 (8th Cir, 1962) 4
Northrop Corp. v. *McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) 7
Papasan v. *Allain*, 478 U.S. 265 (1986) 4
Rowe Entm't, Inc. v. *William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) 8
State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 2
Texaco Inc. v. *Dagher*, 126 S. Ct. 1276 (2006) 2
Texaco Inc. v. *Hasbrouck*, 496 U.S. 543 (1990) 2
Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954) 2, 5
United States v. *Topco Assocs.*, 405 U.S. 596 (1972) 12
Volvo Trucks North America, Inc. v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006) 2
York v. *Ass'n of the Bar*, 286 F.3d 122 (2d Cir. 2002) 4

STATUTES

15 U.S.C. § 1 1
Pub. L. No. 108-37, 118 Stat. 665 (2004) 12

OTHER

John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215 (1983) 11
Robert D. Cooter & Daniel L. Rubinfeld, Reforming the New Discovery Rules, 84 Geo. L. J. 61 (1995-96) 9
Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635 (1989) 9
Corinne L. Giacobbe, Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data, 57 Wash. & Lee L. Rev. 257 (2000) 7, 8, 10
Jonathan T. Molot, How U.S. Procedure Skews Tort Law Incentives, 73 Ind. L.J. 59, 74 (1997) 10
Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962) 5
William H. Wagener, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. Rev. 1887 (2003) 8, 9, 10
Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice & Procedure (May 11, 1999) 8-9

Scott D. Hammond, speech before the ABA Section of Antirust Law Cartel Enforcement Roundtable: An Update of the Antitrust Division's Criminal Enforcement Program (November 16, 2005), ... 12
Scott D. Hammond, presentation by to the OECD Competition Committee, Paris, France: Cracking Cartels With Leniency Programs (October 18, 2005). 12

INTEREST OF AMICUS CURIAE[1]

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question of antitrust law: Whether an allegation that competitors have engaged in parallel conduct, combined with a conclusory allegation that the parallel conduct is the result of a conspiracy to restrain trade, is sufficient to defeat a motion to dismiss an antitrust claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Parallel business conduct is extremely common and usually results from independent decisionmaking by competitors pursuing their own economic interests. Accordingly, parallel conduct does not itself violate the antitrust laws, and evidence of parallel conduct is not by itself sufficient to show a contract, combination, or conspiracy in violation of Section 1 of the Sherman Act. Under the court of appeals' decision in this case, however, antitrust plaintiffs can defeat a motion to dismiss a claim under Section 1 of the Sherman Act—and subject the defendants to costly, burdensome, and protracted discovery—by combining allegations of parallel conduct with a conclusory allegation of a conspiracy in restraint of trade. Because API's members may be subjected to such suits, they have a strong interest in the standard that applies in cases

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[1] Letters from Petitioners and Respondents consenting to the filing of amicus briefs are on file with the Clerk. Pursuant to this Court's Rule 37.6, API states that no counsel for any party authored this brief in whole or in part. Nor did any person or entity, other than API, make a monetary contribution to the preparation or submission of this brief.

alleging that parallel business conduct states an antitrust claim.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API participated as *amicus curiae* at the petition stage in this case, and in other antitrust cases in this Court, including *Texaco Inc.* v. *Dagher*, 126 S. Ct. 1276 (2006); *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006), *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997), and *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented.

SUMMARY OF ARGUMENT

1. This Court has recognized that parallel business conduct, standing alone, does not violate the antitrust laws. *See Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Parallel conduct usually results from independent decisionmaking by competitors facing similar conditions. The oil industry, like virtually every other industry, provides numerous examples of parallel conduct arising from independent action rather than agreement. Consequently, allegations of parallel business conduct, without more, are not sufficient to state a claim under Section 1 of the Sherman Act. That conclusion does not change if the allegations of parallel conduct are coupled with a conclusory allegation of conspiracy.

2. The court of appeals' decision creates perverse litigation incentives. Under the Second Circuit's standard, a complaint alleging a contract, combination or conspiracy in restraint of trade will survive a motion to dismiss so long as the plaintiff's complaint couples allegations of parallel business conduct by competitors

with a conclusory allegation of conspiracy. Denial of a motion to dismiss the complaint entitles the plaintiffs to obtain discovery. Discovery in antitrust cases is often massive, and the burden and expense of discovery falls disproportionately on defendants. As a result, defendants have an incentive to settle even meritless antitrust claims in order to avoid huge discovery costs. This, in turn, encourages plaintiffs and their counsel to file speculative antitrust complaints, and to maximize defendants' discovery burdens in order to extract a settlement. The costs of this antitrust litigation ultimately are borne by consumers and society at large.

3. Experience has shown that private antitrust actions are not a notably effective method of discovering horizontal agreements in violation of Section 1 of the Sherman Act. Most horizontal conspiracies are uncovered by antitrust enforcement agencies, employing tools such as civil investigative demands and grand juries, rather than private antitrust actions. Given the availability of other more effective means of discovering horizontal conspiracies, there is no need to "condemn defendants to potentially limitless 'fishing expeditions'—discovery pursued just 'in case anything turns up'—in hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (notes omitted). Moreover, if parallel business conduct subjects firms to costly discovery in private antitrust litigation, firms may avoid parallel conduct even when it makes economic sense and furthers consumers' interests. Ironically, actual conspirators are better positioned to avoid the appearance of parallel conduct than the vast majority of firms that are not conspirators and so do not know in advance what their competitors will do.

ARGUMENT

This case presents the question whether an antitrust plaintiff states a claim under Section 1 of the Sherman Act by coupling allegations that competitors have engaged in parallel conduct with a conclusory allegation that the conduct resulted from a conspiracy in restraint of trade. The complaint in this case alleges that the Petitioner telephone companies engaged in parallel conduct by (i) resisting the entry of competing companies (Competing Local Exchange Carriers or "CLECs") into their geographic markets, and (ii) failing to enter one another's geographic markets. As the district court explained, this parallel behavior could very well have resulted from independent action rather than collusion. Although the complaint included a conclusory allegation that the defendants agreed to restrain trade in violation of Section 1 of the Sherman Act, it made no supporting factual allegations that, if accepted as true, would support a finding of liability under Section 1.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will be granted if the allegations of the complaint, and all reasonable inferences based on the allegations, will not support a finding of liability. *E.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986); *York* v. *Ass'n of the Bar*, 286 F.3d 122, 125 (2d Cir. 2002); *Maio* v. *Aetna Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000). "[A] general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action." *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 663 (8th Cir. 1962) (Blackmun, J.). Applying this basic rule, the district court correctly dismissed the complaint in this case. The Second Circuit was incorrect to hold that adding a conclusory allegation of conspiracy to an otherwise innocuous description of parallel conduct creates a claim upon which treble damages may be granted under the Sherman Act. The Second Circuit's

decision distorts antitrust doctrine and promotes costly and unnecessary litigation of claims that should not proceed past the pleading stage.

I. Parallel Business Conduct Is Extremely Common, Almost Always Results From Competition Rather Than Collusion, And Thus Is Not A Sufficient Basis For Finding A Conspiracy In Restraint Of Trade.

The Court has held that parallel business conduct, standing alone, does not violate the antitrust laws. *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *see also Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("[C]onscious parallelism" is "not in itself unlawful."). This antitrust principle is supported by antitrust scholars and economists, who agree that parallel behavior by competitors in a market is most often the result of common reaction to common market factors, and not anticompetitive collusion. *See, e.g.*, Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962). "[C]onscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." *Id.* at 658. "Even the fact that competitors have knowingly charged identical prices is a neutral fact in the absence of evidence which would lead one to expect that the prices would have been different if truly independent decisions had been made." *Id.* at 659.

Parallel conduct frequently results from independent action rather than collusion. For example, on a rainy day many pedestrians carry open umbrellas. The pedestrians behave in the same way, but their parallel behavior results from independent decisions about whether and how to keep dry, not an agreement to carry umbrellas. Gasoline stations, like virtually every other business, provide similar examples of parallel

conduct that results from independent decisions rather than agreement. Two or more gasoline stations may be located close together, but this pattern of proximity results from companies' independent evaluation and selection of available sites based on considerations such as traffic volume, access roads, real estate prices, and zoning restrictions. Similarly, many gasoline stations place a roof over the gasoline pumps, but this form of parallel conduct no more results from agreement than pedestrians' independent decisions to carry an umbrella. There are other examples of parallel conduct by gasoline stations: gasoline stations often are brightly lighted, sell soft drinks and snacks, and display prices on large signs that can be read from the road. This does not mean that companies have agreed with each other to install bright lights, sell snacks or post signs. Instead, companies facing similar business conditions make similar but non-collusive decisions.[2]

II. The Second Circuit's Decision Creates Perverse Litigation Incentives and Economic Outcomes.

The Second Circuit recognized that, in holding allegations of parallel conduct combined with a conclusory allegation of conspiracy sufficient to state a claim under Section 1 of the Sherman Act, it may "condemn defendants to potentially limitless 'fishing expeditions'—discovery pursued just 'in case anything turns up'—in

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[2] In some circumstances a firm may take the actions of its competitors into account in making business decisions, but this is not of itself unlawful collusion. For example, in deciding whether to install an air pump to inflate tires, a gasoline station might consider whether other nearby stations provide an air pump. This type of consideration frequently benefits consumers and does not amount to collusion in violation of the antitrust laws. *See Brooke Group*, 509 U.S. at 227 ("[C]onscious parallelism" is "not in itself unlawful.").

hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (notes omitted). Antitrust discovery is very expensive, and its substantial costs are borne largely by defendants and their customers. Faced with the prospect of such costs, defendants may agree to settle even meritless cases to avoid the costs of discovery. This effectively rewards plaintiffs and their counsel for bringing meritless antitrust actions, and encourages the filing of more such actions. The result is to impose unwarranted costs on consumers and society at large.

A. Discovery In Civil Antitrust Cases Is Extremely Expensive And Discovery Costs Fall Primarily On Defendants.

"[T]he statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978). An antitrust class action alleging conspiracy based on observed parallel conduct of the defendant is a particularly tempting target for vexatious litigation. Under the Second Circuit's decision, plaintiffs' attorneys need no factual basis to believe that any conspiracy has occurred in order to state a cognizable claim for a violation of the Sherman Act. Instead, it is sufficient to identify any parallel conduct by two competitors and assert in conclusory fashion that conspiracy is "among the realm of plausible possibilities." Pet. App. 19a.

Once an antitrust action is filed, plaintiffs generally are in a position to demand massive amounts of discovery from defendants. "Massive discovery requests are unfortunately now part of the standard tactical maneuvering of parties immersed in the adversarial process." *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 407 (D.C. Cir. 1984). In complex cases, document discovery alone regularly involves collecting, reviewing, and producing huge numbers of documents, at enormous expense. *See* Corinne L. Giacobbe, Allocating

Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data, 57 Wash. & Lee L. Rev. 257 (2000). The costs of discovery are particularly high in civil antitrust cases. William H. Wagener, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. Rev. 1887, 1898-99 (2003) ("[C]ourts typically permit antitrust discovery to range further (and costs to run higher) than in most other cases."). *See also Asahi Glass Co.* v. *Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) (Antitrust discovery is "inevitably costly and protracted.").

The ubiquity of computers and electronic communications has resulted in an exponential increase in the number of documents that individuals and companies store. *See* Giacobbe, 57 Wash. & Lee L. Rev. at 262. Each individual employee with a computer has the ability to store thousands of pages of documents, and companies store vast amounts of data on backup tapes. For example, one 8-millimeter magnetic backup tape can store the equivalent of 1500 boxes of paper. *See id.* at 263. This increased capacity to store documents, along with the broad rules of discovery, can result in crippling costs. *See, e.g., Rowe Entm't, Inc.* v. *William Morris Agency, Inc.*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002) (estimating that it would cost more than $9 million to produce years of email contained on backup tapes). The parties must hire vendors to copy or scan physical documents, and experts to search stored electronic documents. *See* Giacobbe, 57 Wash. & Lee L. Rev. at 263-64. Document production alone thus can take months or even years, thousands of hours of attorney's fees, and increasingly, millions of dollars. *See id.* at 265-66.

It has been reported that discovery costs represent 90 per cent of the litigation costs in cases where discovery is actively employed. Memorandum from Hon. Paul V.

Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice & Procedure 4 (May 11, 1999), http://www.uscourts.gov/rules/archive/1999/repcivil.pdf (last visited Aug. 25, 2006). While document production may represent the single greatest cost of discovery, other discovery obligations impose both monetary and nonmonetary costs. For instance, litigants suffer lost productivity because they must make their employees available for depositions and document collection tasks. Wagener, 78 N.Y.U. L. Rev. at 1896.

The often enormous costs of discovery in antitrust cases are borne primarily by defendants. *See* Wagener, 78 N.Y.U. L. Rev. at 1894, 1899 (noting that antitrust plaintiffs can limit their exposure to extensive discovery through pleading); Robert D. Cooter & Daniel L. Rubinfeld, Reforming the New Discovery Rules, 84 Geo. L. J. 61, 68 (1995-96) (noting that "most compliance costs" of discovery are "borne by the complying party"). This is particularly true in the class action context, where most of the information that is relevant to the plaintiffs' claims is likely to be in the possession of the defendant. Moreover, judges have limited ability to curb the enormous costs of discovery. *See* Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves. . . . The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow."). *See also In re: Brand Name Prescription Drugs Antitrust Litig.*, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995) (refusing to shift cost of discovery of 30 million pages of e-mail).

B. The Second Circuit's Standard Encourages Meritless Litigation and Imposes Unjustified Costs On Consumers.

The high cost of conducting discovery creates an incentive for defendants to settle even meritless antitrust suits to avoid the significant costs of discovery. *See* Wagener, 78 N.Y.U. L. Rev. at 1898 ("[D]efendants unable to shift the costs of complying with requests for electronic documents feel pressured to settle lawsuits to avoid the discovery costs."); Giacobbe, 57 Wash. & Lee L. Rev. at 268 ("The prospect of fulfilling these expensive discovery requests forces many defendants to settle rather than incur such tremendous costs at a very early stage of the litigation process."). Even if a defendant concludes that the suit lacks merit, discovery represents a significant cost that likely will never be recovered. In these circumstances, Defendants have an economic incentive to settle simply to avoid the high costs of discovery.

"Strategically minded plaintiffs recognize that defendants risk incurring onerous discovery costs if an antitrust case progresses beyond the pleadings stage." Wagener, 78 N.Y.U. L. Rev. at 1893. This, in turn, creates an incentive for plaintiffs' lawyers to file meritless antitrust actions based on a calculation that defendants may enter into a settlement agreement to avoid costly discovery. To increase the defendants' incentive to settle, plaintiffs are likely to make discovery as costly as possible for defendants. Jonathan T. Molot, How U.S. Procedure Skews Tort Law Incentives, 73 Ind. L.J. 59, 74 (1997) (One reason that "discovery costs are unreasonably high" is that a "party can improve its settlement position by increasing its opponent's anticipated legal costs.").

"[T]o the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement

value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975). This social cost falls on defendants, the courts, and ultimately on consumers and society itself.

Decisions by antitrust defendants to settle meritless suits to avoid the substantial litigation costs necessary to prevail on the merits will encourage plaintiffs' counsel to file more such suits. The cost of such an escalating spiral of litigation would not be confined to the parties to the case. The resources expended to litigate or settle meritless claims are a cost of doing business, and thus are likely to be passed on to consumers.

III. Private Antitrust Suits Are An Inefficient Means For Discovering Horizontal Antitrust Conspiracies.

An additional reason for rejecting the Second Circuit's pleading standard is that private antitrust suits are not a particularly efficient or effective means of discovering conspiracies in violation of Section 1 of the Sherman Act. Experience shows that most antitrust conspiracies are uncovered by the federal antitrust enforcement agencies, and that most successful private antitrust actions alleging unlawful conspiracies simply follow on from violations initially discovered and prosecuted by the government.[3] Allowing private suits to proceed to discovery whenever competitors engage in

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[3] *See* John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 220-21 (1983) ("[A]vailable empirical evidence does not provide much support for the thesis that the private attorney general significantly supplements public law enforcement by increasing the probability of detection").

parallel behavior is not necessary or even conducive to "the preservation of economic freedom and our free-enterprise system." *United States* v. *Topco Assocs.*, 405 U.S. 596, 610 (1972).

A. Private Antitrust Suits Alleging Horizontal Antitrust Conspiracies Usually Follow Investigations By The Federal Government.

Since the mid-1990s the Department of Justice has significantly expanded its criminal enforcement program and has recovered nearly $3 billion in fines from antitrust violators.[4] An important part of the DOJ criminal enforcement program is the provision that grants amnesty to the first company to report a violation to the Antitrust Division. The amnesty program has "been the Division's most effective investigative tool" and "[c]ooperation from leniency applicants has cracked more cartels than all other tools at our disposal combined — searches, FBI 'drop in' interviews, informants, Interpol red notice watches, etc."[5]

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004[6] solidified the importance of the amnesty program as the primary method of uncovering cartel activity. The legislation provides that participants

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[4] *See* Scott D. Hammond, Deputy Assistant Attorney General, speech before the ABA Section of Antirust Law Cartel Enforcement Roundtable: An Update of the Antitrust Division's Criminal Enforcement Program (November 16, 2005), http://www.usdoj.gov/atr/public/speeches/213247.htm.

[5] *See* Scott D. Hammond, presentation by to the OECD Competition Committee, Paris, France: Cracking Cartels With Leniency Programs (October 18, 2005), http://www.usdoj.gov/atr/public/speeches/212269.htm.

[6] Pub. L. No. 108-237, Title II, 118 Stat. 665 (2004).

in the DOJ amnesty program are subject only to actual (not treble) damages in follow-on civil suits. Congress recognized that treble-damages suits are an important part of deterring and punishing illegal behavior, but that are not the primary means by which such conspiracies are detected.

B. Allowing Suits Based On Observed Parallel Conduct Would Discourage Rational Economic Decisionmaking.

As noted above, parallel conduct generally results from competitors' similar reactions to common market conditions. The Second Circuit's standard would allow antitrust suits alleging that parallel conduct resulted from an unlawful conspiracy to proceed to costly discovery, so long as conspiracy is "among the realm of plausible possibilities." Pet. App. 19a. As the Second Circuit made clear, it views allegations of parallel conduct as sufficient to satisfy this "modest" standard. *Id.* at 22a. Thus, the mere existence of parallel business conduct enables plaintiffs to state a claim for conspiracy under Section 1 of the Sherman Act.

The Second Circuit's standard turns lawful and rational business decisions into a factual predicate for antitrust conspiracy, with its attendant potential for substantial legal costs. Under the Second Circuit's standard, companies will be obliged to consider whether to adopt a policy of "conscious nonparallelism" to avoid creating the basis for costly antitrust litigation. Such a policy is likely impossible to implement in many instances and is economically inefficient. Competitors would have to balance the possibility of a lawsuit and costly discovery against other factors in selecting a course of conduct. For instance, were this case to arise again, each Incumbent Local Exchange Carrier ("ILEC") would have to consider not only whether expanding into another ILEC's territory would be in the company's short-term and long-term interest, but also what litigation costs the company might

face if its contemplated parallel action were the basis of an antitrust conspiracy claim. Thus, instead of providing a disincentive for companies to engage in collusion, the Second Circuit's standard could encourage companies to adopt second-best business strategies to avoid litigation costs.

Ironically, actual conspirators could more easily avoid the appearance of parallel conduct than the vast majority of competitors who are not colluding. Conspirators could structure their agreement to avoid overtly parallel conduct that might form the basis of a Sherman Act Section 1 lawsuit. Independent competitors, by contrast, do not have the ability to know what other competitors will do and so may not be able to avoid parallel conduct.

CONCLUSION

The decision of the Second Circuit should be reversed.

Respectfully submitted,

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